Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

MICHAEL R. CUENCA,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to exercise the United States Supreme Court's power of supervision to finally give this appellant fair hearing of the legal issues presented on appeal, which have been steadfastly ignored during appellate review, at all levels of this appeal and because the United States Court of Appeals for the Tenth Circuit has entered a decision that is in conflict with its own decisions, as well as the decisions of other United States courts of appeals and the United States Supreme Court.

2. Certiorari should be granted to resolve the conflict among the circuits relative to the method(s) for determination of dischargeability of educational loans under 11 U.S.C. § 523(a)(8)(B) to ensure a fair, equitable, consistent determination of dischargeability for all debtors, in all circuits.

3. Certiorari should be granted to resolve the conflict among the circuits relative to the definition of the phrase "undue hardship" in the dischargeability provision of 11 U.S.C. § 523(a)(8)(B) and to correct the lower courts' historically widespread strict construction of 11 U.S.C. § 523(a)(8)(B), which is contrary to and in direct conflict with legislative intent, United States Courts of Appeals law and United States Supreme Court bankruptcy law.

4. Certiorari should be granted to determine whether 11 U.S.C. § 523(a)(8)(B) is unconstitutionally void for vagueness.

PARTIES TO THE PROCEEDING

Petitioner, Michael R. Cuenca, *pro se,* is a resident of Lawrence, Kansas. He was the Plaintiff in the lower court proceedings of this case in the United States Bankruptcy Court for the District of New Mexico and was the Appellant before the United States District Court for the District of New Mexico and in the United States Court of Appeals for the Tenth Circuit.

Respondent, United States Department of Education, was the Defendant in the lower court proceedings of this case in the United States Bankruptcy Court for the District of New Mexico and was the Appellee before the United States District Court for the District of New Mexico and in the United States Court of Appeals for the Tenth Circuit.

There are no other parties to this action.

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No.

In The

Supreme Court of the United States

October Term, 1995

MICHAEL R. CUENCA,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

Determination of Dischargeability of Educational Loan under 11 U.S.C. § 523(a)(8)(B)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On February 8, 1994, United States Bankruptcy Court for the District of New Mexico ruled orally (1a) that the educational loan of the debtor, Michael R. Cuenca (Petitioner), was nondischargeable under 11 U.S.C. § 523(a)(8)(B).

On August 18, 1994, the United States District Court for the District of New Mexico issued its MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION. This opinion (6a) recommended affirming the bankruptcy court's decision.

On October 12, 1994, the United States District Court for the District of New Mexico issued an ORDER (12a) adopting the MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION.

On August 23, 1995, the United States Court of Appeals for the Tenth Circuit issued an ORDER AND JUDGMENT (13a), affirming.

On October 26, 1995, the United States Court of Appeals for the Tenth Circuit issued an ORDER (25a), denying the Petitioner's Petition for Rehearing.

STATEMENT OF JURISDICTION

Petitioner seeks review of the February 8, 1994, opinion of the United States Bankruptcy Court for the District of New Mexico, ruling the educational loan of the Petitioner nondischargeable. Petitioner seeks review of the October 12, 1994, opinion of the United States District Court for the District of New Mexico and the August 23, 1995, opinion and the denial of rehearing of the United States Court of Appeals for the Tenth Circuit, affirming the Bankruptcy Court's ruling. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

11 U.S.C. § 523(a)(8) excepts from discharge in bankruptcy those debts:

§ 523(a)(8):

> for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless --
>
> (A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7

years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

STATEMENT OF THE CASE

This case is a determination of dischargeability under 11 U.S.C. § 523(a)(8)(B).

Michael R. Cuenca (Petitioner) graduated from the University of Kansas in June, 1985, with a master's degree in creative and critical writing and a student loan indebtedness of $21,500, repayable at 7% interest over ten years. The eight-month grace period commenced on that date and expired February 16, 1986, with payments scheduled to begin March 16, 1986. The repayment schedule required 115 payments of $255.00 per month, with a final payment of $352.40 on October 16, 1995.

Several years of well-documented unemployment and serious under-employment followed. The Petitioner's average income for the period between 1985 and 1990 was less than $13,000.

Throughout this period, Petitioner made serious, good-faith efforts to remain current with creditors, applying for and receiving approval for no fewer than 12 unemployment forebearances and hardship deferments, covering a period of more than four years. These periods of unemployment and good-faith efforts to obtain employment were explicitly documented and approved by the creditor. None of the deferments were for the purposes of re-enrolling in any educational institution. Ironically, these official deferments then prevented the Petitioner from qualifying for an automatic bankruptcy discharge of his educational loan because of rulings that have excluded even these hardship deferments from the seven year tolling pursuant to 11 U.S.C. § 523(a)(8)(A).

As interest continued to accrue, Petitioner was offered the opportunity to consolidate his debt, in order to make payments

more affordable. Petitioner exercised this option and the debt was consolidated on March 30, 1991.

Petitioner was subsequently married and has one dependent child.

At the time of the trial for determination of dischargeability, full payments for service of this debt would have totaled 14% of the Petitioner's income, while 20 U.S.C. § 1095(a)(1) places a 10% limit for garnishment of debtors' incomes. Also, 20 U.S.C. § 1085(o)(2) directs the United States Department of Education to establish criteria for determining hardship based on "the borrower's income and debt-to-income ratio".

Petitioner originally filed a bankruptcy petition in the Southern District of California, No. 91-07395-LM07, on July 2, 1991, and received a discharge on or about November 1, 1991. When the Petitioner filed bankruptcy, the educational loan in question represented 51% of the Petitioner's total indebtedness. At the time of the trial on the merits of the adversary proceeding, it had been eight years since the educational debt first became due and nine years since the Petitioner left school.

Subsequent to the filing of the initial bankruptcy petition, debtor suffered a period of total disability that required a job change, reduction of income and relocation expenses from California to New Mexico. As a result of these further financial difficulties, Petitioner was unable to make payments on this debt and made numerous attempts to obtain help from the creditors and the US Department of Education in reaching some satisfactory arrangement. Even with the assistance of one US Senator and one US Representative, even with 20 U.S.C. § 1085(o) directing the U.S. Department of Education to formulate and utilize its own guidelines for determination of economic hardship, the Dept. of Education responded only with form letters of inability to take any action. The student loan was consequently declared in default on October 2, 1992. After the periods of deferment, the consolidation and the default, the student loan indebtedness had, at the time of the trial, reached a total of $37,724. (It is important to note that the original holder of the educational loan, Higher Education Assistance Foundation, was shut down by the U.S. Department of

Education for profiting by failing to take enough action to prevent defaults.)

On March 29, 1993, Petitioner filed an adversary complaint to determine dischargeability of the student loan, per 11 U.S.C. § 523(a)(8)(B). The San Diego Office of the United States Attorney, on behalf of the United States Department of Education, filed a motion to intervene and substitute for the Higher Education Assistance Foundation. Motion came for hearing on June 10, 1993, in San Diego. Motion was granted. Petitioner filed for reopening of the Chapter 7 case on June 22, 1993. Respondent moved for dismissal of adversary complaint on the grounds that the case was not properly reopened prior to the filing on or about June 25, 1993. Petitioner filed for transfer of bankruptcy case on July 9, 1993. Motions came for hearing August 5, 1993. Court ordered reopening of bankruptcy case, transfer of bankruptcy case to District of New Mexico and dismissal of adversary proceeding.

Thereafter, in the US Bankruptcy Court, District of New Mexico, on or about September 25, 1993, Petitioner filed a complaint to determine dischargeability of a student loan, per 11 U.S.C. § 523(a)(8)(B). Complaint was assigned Adversary Proceeding No. 93-1288 R and trial was held on the merits of the complaint before the Honorable Stewart Rose on February 8, 1994. The Bankruptcy Court ruled that the debt in question is nondischargeable per 11 U.S.C. § 523(a)(8)(B). On February 21, 1994, Petitioner filed a Motion for Amendment of Judgment, requesting the Bankruptcy Court reconsider its decision based on the Court's findings of fact and their compliance with the accepted "Johnson" test for dischargeability; and on the precedent for authority to reduce the debt by any amount. Motion came for hearing on March 7, 1994 and was denied.

Petitioner filed a Notice of Appeal to the United States District Court for the District of New Mexico on March 21, 1994.

The Magistrate Judge of the United States District Court for the District of New Mexico issued Proposed Findings and Recommended Disposition on August 18, 1994, recommending affirmation of the Bankruptcy Court's decision, without consideration or discussion of the Petitioner's issues. Petitioner filed an Objection to the Proposed Findings and Recommended

Disposition of the Magistrate Judge, citing the Magistrate's failure to consider the issues presented on appeal.

The United States District Court for the District of New Mexico overruled the objection and adopted the Magistrate Judge's Proposed Findings and Recommended Disposition on October 12, 1994.

Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on December 12, 1994. A panel of the Court issued an opinion on August 23, 1995, affirming the Bankruptcy Court's decision, again with neither consideration nor discussion of the issues presented on appeal.

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on October 3, 1995, in which the Petitioner once again argued that the decision was contrary to both Tenth Circuit and United States Supreme Court decisions and that the Courts had yet to consider the legal issues properly presented on appeal. Petition and Suggestion were denied in an order issued by the Court on October 26, 1995.

Petitioner now seeks the review of this Court as the court of last resort for the hearing of the legal issues properly presented on appeal and to this date unconsidered.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO EXERCISE THE UNITED STATES SUPREME COURT'S POWER OF SUPERVISION TO FINALLY GIVE THIS APPELLANT FAIR HEARING OF THE LEGAL ISSUES PRESENTED ON APPEAL, WHICH HAVE BEEN STEADFASTLY IGNORED DURING APPELLATE REVIEW, AT ALL LEVELS OF THIS APPEAL, AND BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS FNTERED A DECISION THAT IS IN CONFLICT WITH ITS OWN DECISIONS, AS WELL AS THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND THE UNITED STATES SUPREME COURT.

The legal issues properly presented by the Petitioner in this appeal in all but one instance deal with the conclusions of law of the Bankruptcy Judge, and to date have been neither considered nor ruled upon by the appellate courts. The Bankruptcy Court's decision has been affirmed by these appellate courts after recitations of the evidence presented at trial, after the oversimplification of the appeal, and after classification of the final judgment of the Bankruptcy Court as a finding of fact, applying the incorrect standard for appellate review.

The Petitioner has pleaded repeatedly for the appellate courts to review and consider the legal issues presented. The appellate courts have refused each and every request.

The issues presented for this appeal were:

1. Did the Bankruptcy Judge err in denying discharge after not properly applying the standard "Johnson" tripartite test, or any other accepted test, for determining educational loan dischargeability under 11 U.S.C. § 523(a)(8)(B)?
2. Was ample evidence presented at trial to establish an affirmative determination of dischargeability?

3. Did the Bankruptcy Judge err by concluding that he had no authority to establish a payment plan nor authority to discharge any portion of the debt?

4. Did the Bankruptcy Judge err by finding that "The size of the debt is a consideration which I am not to consider."?

5. Was the Bankruptcy Judge's finding of fact that the debtor is "not burdened with a number of old debts" clearly erroneous?

6. Since the evidence established and the Bankruptcy Judge affirmatively declared in his Findings of Fact and Conclusions of Law that the debtor/plaintiff was not an abusive student debtor targeted by the legislative policy behind 11 U.S.C. § 523(a)(8)(B), is the debtor entitled to discharge under the intent of the law?

7. After the evidence established and the Bankruptcy Judge affirmatively declared in his Findings of Fact and Conclusions of Law that the debtor/plaintiff was not an abusive student debtor targeted by the legislative policy behind 11 U.S.C. § 523(a)(8)(B), did the Bankruptcy Judge then commit an abuse of discretion by construing the Bankruptcy Code liberally in favor of the creditor, contrary to Tenth Circuit Court of Appeals and United States Supreme Court law?

8. Were the Bankruptcy Judge's failure to apply, or disregard of, the standard "Johnson" tripartite test or any other established test, plus his disregard of important evidence and facts, made possible by and consequences of the unconstitutional vagueness of 11 U.S.C. § 523(a)(8)(B), through its failure to define "undue hardship", allowing individual courts to apply arbitrary and inconsistent standards for discharge?

In the *MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION*, this volume, page 6a, the

Magistrate Judge of the United States District Court for the District of New Mexico wrote:

> [Petitioner] raised a number of arguments as error, but in essence he contends that the bankruptcy court erred in finding that the facts of this case do not establish "undue hardship," as that term is used in 11 U.S.C. § 523(a)(8)(B). *Id.*

and:

> I cannot say that the bankruptcy judge's findings of fact are erroneous, much less clearly erroneous. The bankruptcy judge correctly ruled that repayment of Cuenca's student loan would not constitute an undue hardship on him or his dependents. *Id.*

This is a misrepresentation of the issues presented on appeal and application of the wrong standard for appellate review. The Magistrate Judge's assertion that the Petitioner "contends that the bankruptcy court erred in finding that the facts of this case do not establish 'undue hardship,'" is completely opposite to the facts of this appeal. In reality, Petitioner has been arguing since his first brief that the findings of fact of the Bankruptcy Court do in fact establish "undue hardship" as defined by the Courts and as determined by the Courts and that the Bankruptcy Court erred in its applications and conclusions of law after stating its findings of fact. In his *OBJECTION TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION*, this volume, page 9a, Petitioner argued:

> These findings and recommendations are based on the gross oversimplification of this appeal and the complete disregard of the valid, stated issues on appeal. Acceptance by the District Judge of these findings and recommendations would be a serious error and contemptuous of the Tenth Circuit Court of Appeals.
>
> Regardless of the assertions of the Appellee and the Magistrate Judge, this appeal does not revolve around the findings of fact of the Bankruptcy

> Judge. In fact, the Bankruptcy Judge's Findings of Fact support the issues presented on this appeal.

and:

> The true, valid issues on this appeal . . . resolve around the *conclusions of law and statutory authority* of the Bankruptcy Judge to deny discharge in this case -- based on his findings of fact and the facts of the case. The recommendation of the Magistrate Judge to disregard these true issues is capricious and the further recommendation to affirm the decision of the Bankruptcy Judge is based on a discussion of evidence and issues irrelevant to this appeal. Both recommendations should be disregarded by the District Judge.
>
> The issue of appellate authority and review regarding conclusions of law is clearly settled. Conclusions of law are reviewed *de novo. Virginia Beach Federal Savings and Loan Ass'n v. Wood*, 901 F.2d 849, 851 (10th Cir.1990); *In re Schneider*, 864 F.2d 683, 685 (10th Cir.1988). The issues designated by the appellant questioning the Bankruptcy Judge's conclusions of law are valid, are well taken, and must be duly considered by the District Court.

Regardless, the United States District Court disregarded these arguments and adopted the Magistrate Judge's recommendations and affirmed the decision of the Bankruptcy Court. (*ORDER*, this volume, page 12a)

Then, on appeal to the United States Court of Appeals for the Tenth Circuit, Petitioner again presented the issues regarding the Bankruptcy Court's conclusions of law. And once again, the appellate court disregarded those issues, once again recited the evidence it felt justified the Bankruptcy Court's decision, and affirmed against the objection and pleadings of the Petitioner.

In its opinion, the Court of Appeals panel summarized the appeal, writing:

> The essence of Mr. Cuenca's argument is found in the remarks of the bankruptcy court apparently made at the conclusion of the contested hearing. There the bankruptcy judge stated: "I have no doubt of your good faith, and you are absolutely not the kind of person that is reported on 60 Minutes or who has abused the system." As Mr. Cuenca argues, "This is tantamount to finding a defendant not guilty of murder and then sentencing him to a life prison anyway." Stated differently, Mr. Cuenca asserts there exists an irreconcilable difference between the quoted remarks of the bankruptcy judge and the bankruptcy judge's conclusion that neither he nor his dependents would suffer an undue hardship. Mr. Cuenca's primary argument at trial was that if he had to pay his educational debt, he probably would not be able to pay the cost of his three-year-old child's college education. *ORDER AND JUDGMENT*, this volume, page 13a.

and:

> We do not address Mr. Cuenca's constitutional argument as it was not supported with any reasoned argument, nor was it supported with any applicable law, nor was it appropriately raised. Were we to consider the argument, we would have no difficulty pronouncing the bankruptcy statute, 11 U.S.C. § 523(a)(8)(B), constitutional. *Id.*

Once again, an appellate court has ignored or has not comprehended the issues presented on appeal. This appeal does, in fact, resolve around the Bankruptcy Judge's conclusions of law, based on his stated findings of fact and the accepted methods for determination of dischargeability under 11 U.S.C. § 523(a)(8)(B). And the assertion that the Petitioner's primary argument at trial was that he would be prevented from paying for a child's college education is evidence that the appellate panel failed to review the entire record of this case, because the primary argument presented by the Petitioner at trial was that the Petitioner satisfied the three

criterion of the accepted and previously applied tripartite test for determination of dischargeability.

Additionally, the above statement by the panel regarding the Petitioner's constitutional issue would seem to be extremely prejudicial, for how could any court know how it would rule on an issue without consideration of that issue? And as the Petitioner argued in his *PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC*, this volume, page 16a:

> The statement is wrong. The Appellant's constitutional argument is presented on pages 28-32 of the *Appellant's Brief* for the District Court appeal and is supported with no fewer than eight (8) citations, including United States Supreme Court law. This statement seems horribly unjust, for how can any court so vehemently state how it would rule on an argument the court admits it hasn't even considered? The panel's inadvertent misstatement of the Appellant's presentation of the constitutional argument could indicate that the panel did not read the original briefs of the appeal. It could be argued that, based on appearances, the panel inadvertently ruled without properly considering the Appellant's arguments and citations in support of the other aspects of the appeal. *Id.*

In essence, the appellate courts have rejected the Petitioner's issues and arguments without consideration, applying to the appeal the "clearly erroneous" standard of review for findings of fact, rather than the *de novo* standard of review applicable to the conclusions of law of a court, as evidenced by these statements in their opinions:

> I cannot say that the bankruptcy judge's findings of fact are erroneous, much less clearly erroneous. The bankruptcy judge correctly ruled that repayment of Cuenca's student loan would not constitute an undue hardship on him or his dependents. *MAGISTRATE JUDGE'S PROPOSED*

FINDINGS AND RECOMMENDED DISPOSITION, this volume, page 6a.

and:

> We need not fashion a test under the facts of this case. Mr. Cuenca's income is not at or below poverty level. Many families would be envious of his annual income. Mr. Cuenca has identified no unique and extraordinary circumstance that would warrant the nonpayment of his student loan. *ORDER AND JUDGMENT*, this volume, page 13a.

Once again, these statements and recitations of the evidence of the case indicate that the Courts have not considered the legal issues presented on appeal. And as the Petitioner has argued:

> At issue in this appeal is not just whether or not the judges of the appeals courts agree with the Bankruptcy Court's judgment, but how the Bankruptcy Court came to that judgment and how dischargeability under 11 U.S.C. § 523(a)(8)(B) should be determined throughout the Tenth Circuit in a manner that will prevent arbitrary and capricious denials of discharge falling back on various strict constructions of the phrase "undue hardship" and to provide all debtor/plaintiffs an equal opportunity under the law.
>
> Courts have long agreed that judgments are not findings of fact, but are "conclusions of law upon facts found or admitted by the parties or upon their default in the course of the suit", *Allegheny County v. Maryland Casualty Co.*, C.C.A.Pa., 132 F.2d 894, 897; that a decision "at best, was an ultimate finding of fact and, as such, did not constitute 'findings of fact,'", *Wimmer v. Cook*, C.A.4 (W.Va.), 774 F.2d 68, 74.
>
> The decision of a court is a conclusion of law and: "a 'conclusion of law' is [a] decision of [a] court stemming from ultimate factual issues which determine result of dispute in nonjury trial." *O'Shea v. Hatch*, 640 P.2d 515, 520; or, "the final

judgment or decree required on basis of facts found or verdict", *Peoples v. Peoples,* 179 S.E.2d 138, 141.

Further, since the case revolves around the vague term "undue hardship", the entire case is reviewable *de novo* because if a "term carries legal implications, determination of whether it has been established in case is 'conclusion of law,' for purposes of appeal. *Woodruff v. McClellan,* Wash., 622 P.2d 1268; *Para-Medical Leasing, Inc. v. Hangen,* 739 P.2d 717, 722. *PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC,* this volume, page 16a.

The issues presented on appeal by this Petitioner are reasonably presented and well-supported. Even if these issues are found to be wrong, they must first be addressed. This court should grant certiorari as an exercise of its power of supervision to finally provide this Appellant/Petitioner with an opportunity to have his issues properly considered and decided.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO THE METHOD(S) FOR DETERMINATION OF DISCHARGEABILITY OF EDUCATIONAL LOANS UNDER 11 U.S.C. § 523(a)(8)(B) TO ENSURE A FAIR, EQUITABLE, CONSISTENT DETERMINATION OF DISCHARGEABILITY FOR ALL DEBTORS, IN ALL CIRCUITS.

Since the enactment of 11 U.S.C. § 523(a)(8), the judicial history of the statute can be called chaotic, at best. The inclusion of the phrase "undue hardship" has left the courts with a quandary. Individual courts are left to make whatever determination they so choose, whether it be consistent, equitable or arbitrary, protected by the ambiguity of the phrase. How, then, can individual debtors in various Courts across the country be assured that their case will be decided fairly and equitably, without

prejudice or caprice? They can't. Debtors are subject to what one Court has described as "the unbridled subjectivity which seems to pervade many of the decisions in this area." *In re Bryant,* 72 B.R. 913 (Bkrtcy.E.D.Pa. 1987).

As a remedy, those Courts seeking a just determination based on some sort of objectivity have devised various tests for determining dischargeability. One of these tests, known as the "Johnson" test, was previously applied in the United States Bankruptcy Court of the District of New Mexico (*see In re Armijo,* 13 BR 175 (1981)) and was set forth in *In re Johnson,* 5 Bankr.Ct.Dec. (CRR) 532 (E.D.Pa. 1979). Its criterion are described as "the mechanical test, the good faith test, and the policy test." *In re Correll,* 105 BR 302 (Bkrptcy. W.D. Pa. 1989) at 305. The mechanical test "focuses on the debtor's expenses and future financial resources to determine if debtor's income is sufficient to support the debtor and his dependents at a minimal standard of living, as well as fund repayment of the student loan." *Correll,* at 305. The good faith test "examines the debtor's efforts to obtain employment, minimize expenditures, and maximize resources." *Id.* Through the policy test "the court attempts to determine whether discharging the student loan would frustrate Congressional Policy underlying 11 U.S.C. § 523(a)(8)(B)." *Id.*

But there are other tests, as well, and the Courts of various circuits -- and even Courts within circuits -- are in conflict about which test to use -- or even if any test should be used. For example, in the *Matter of Roberson,* 999 F.2d 1132 (7th Cir. 1993), the Court of Appeals rejected the "Johnson" test that had been used by both lower Courts, in favor of the more strict "Brunner" test:

> "Undue hardship" requir[es] a three-part showing (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith

> efforts to repay the loans. *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir.1987)

In the case at bar, the Petitioner prepared and presented a case at trial based on the "Johnson" tripartite test, primarily because that test had previously been used in a published case originating in the United States Bankruptcy Court for the District of New Mexico. And even though the Court responded to that presentation with a recitation of the fulfillment of the "Johnson" criteria, the Court then discarded the test to rule the debt nondischargeable.

Other Courts have debated the use of tests and, of course, are free to disregard them completely. The Respondent in this case has presented just such an argument in favor of rejecting the tests, citing the following cases wherein Courts argued against or decided against specific tests: *In re Craig*, 64 B.R. 854, 857 (W.D.Pa.. 1986), *In re Bryant*, 72 B.R. 913 (Bkrtcy.E.D.Pa. 1987), *In re Reyes*, 154 B.R. 320, 323 (E.D.Ok.1993), *In re Claxton*, 140 B.R. 565, 568 (N.D.Ok.1992).

Because of the ambiguity of 11 U.S.C. § 523(a)(8)(B), no debtor can be assured of equal treatment under that statute without some form of test. And the United States Supreme Court has ordered that "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 87 S.Ct. 274 (1966), at 277.

Unfortunately, there has been no ultimate direction by this Court as to which, if any, of these tests are valid and should be followed by the Courts. There remains a great deal of conflict among the circuits regarding these and other tests. This Court should grant certiorari to resolve that conflict and definitively establish for all Courts in the land which, if any, of these tests to use and how all Courts in the land shall determine dischargeability under an extremely vague statute.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO THE DEFINITION OF THE PHRASE "UNDUE HARDSHIP" IN THE DISCHARGEABILITY PROVISION OF 11 U.S.C. § 523(a)(8)(B) AND TO CORRECT THE LOWER COURTS' HISTORICALLY WIDESPREAD STRICT CONSTRUCTION OF 11 U.S.C. § 523(a)(8)(B), WHICH IS CONTRARY TO AND IN DIRECT CONFLICT WITH LEGISLATIVE INTENT, UNITED STATES COURTS OF APPEALS LAW AND UNITED STATES SUPREME COURT BANKRUPTCY LAW.

The Courts have established that Congress was quite clear in its intent in enacting 11 U.S.C. § 523(a)(8). The expressed legislative intent was to correct "a few abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well paying jobs, who have filed bankruptcy shortly after school." *In re Correll*, 105 BR 302 (Bkrptcy. W.D. Pa. 1989) at 306. And:

> The legislative history of this particular exception indicates that there was very strong negative Congressional reaction to this particular scenario: Debtor graduates from college with large number of student loans; before debtor embarks on his journey through his working life, he runs all of his student loans, which constitute virtually his only debts, through Bankruptcy Court, not having paid anything on them at all. *Matter of Love*, 28 BR 475 (Bkrtcy. 1983), at 478.

The action that followed that negative reaction was the enactment of 11 U.S.C. § 523(a)(8), which provided the means by which that particular scenario could be prevented, complete with an escape clause that would preserve the fundamental "fresh start" spirit of bankruptcy and prevent the entrapment of the innocent, honest student loan debtor in a provision intended only to prevent abuse. 11 U.S.C. § 523(a)(8)(A) establishes a period of time, after the passing of which, student loans are discharged -- without question. 11 U.S.C. § 523(a)(8)(B) provides the escape clause,

allowing for the discharge of student debt in bankruptcy after establishment of the validity of the petition.

Upon a simple evaluation of 11 U.S.C. § 523(a)(8), how could anyone of "common intelligence" reasonably infer that Congress intended anything other than the prevention of Bankruptcy Code abuse? It's an insult to a reasonable legislative body to assert that Congress on the one hand would enact a provision that would allow a student loan debtor to walk away from his debt -- without question -- merely because a certain period of time had elapsed, while on the other hand enacting an attached provision that was intended to prevent the discharge of all student debts -- regardless of the validity of the bankruptcy petition. It is plainly obvious that the statute was enacted solely to prevent the abuse of the bankruptcy system by dishonest student debtors.

Indeed, the courts have agreed that it would be ludicrous to extend the legislative intent behind 11 U.S.C. § 523(a)(8):

> This provision states roughly that after [seven] years there is no problem with dischargeability. . . . Is the Court to assume that the policy reasons for nondischargeability of this particular type of debt remain constant for [seven] years and then disappear altogether at the [seven] year point? It strains credulity to believe that is so. . . . *In re Love*, 28 BR 475 (Bkrtcy. 1983), at 479.

In the *Bankruptcy Law Revision, Report of the Committee on the Judiciary*, 95th Congress, 1st Session, Report No. 95-595, which soundly condemned the provision as being unnecessary, unfair, contrary to the fundamental spirit of bankruptcy, and perhaps unconstitutional, the Comptroller General of the United States further elaborated on the impetus behind the eventual enactment of 11 U.S.C. § 523(a)(8), saying:

> The sentiment for an exception to discharge for educational [loans] does not derive solely from the increase in the number of bankruptcies. Instead, a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have

> filed bankruptcy shortly after leaving school and before any loans became due, have generated the movement for an exception to discharge. *Bankruptcy Law Revision, Report of the Committee on the Judiciary*, 95th Congress, 1st Session, Report No. 95-595, at 133.

Nowhere is there a record of any members of Congress stating that the Bankruptcy Code should be changed in order to prevent honestly bankrupt students from deservedly escaping the burden of their student loan indebtedness. In fact, even supporters of the provision went so far as to express their concern that the Bankruptcy Code retain its spirit of "fresh start" for honestly bankrupt students. Representative Hyde of Illinois stated that he could support the provision only because he believed it protected "the honest student who simply cannot meet his financial obligations." *125 Cong. Rec.*, 10097 (1979). Representative Sensenbrenner of Wisconsin further stated:

> The intent of Congress in the last session was quite clear to make sure that students could not graduate, immediately file for bankruptcy, and thus discharge their obligations to repay the loans. *Id.*

These and statements on the floors of the House and Senate time and again clearly show that the Bankruptcy Code was changed *solely* for the purpose of preventing the abuse of the student loan system by a few otherwise financially capable students who filed bankruptcy dishonestly, with only the intention of eliminating their educational indebtedness. It also indicates that Congress never intended that honestly bankrupt students be innocently caught up in this attempt to stop the abuses.

Even more specifically, in that same report, the Comptroller General of the United States provided a clear guideline for the determination of whether or not the bankruptcy was abusive:

> If under 80% of the debtor's debts were educational debts, then it is likely that the debtor has encountered financial difficulty after school, and that the bankruptcy is a result of a true need for bankruptcy relief rather than an abuse of the

> bankruptcy system. *Bankruptcy Law Revision, Report of the Committee on the Judiciary,* 95th Congress, 1st Session, Report No. 95-595, page 133.

(Again, it should be pointed out that the educational loan of the Petitioner represented only 51% of his total debt.)

Petitioner has argued in the issues originally presented on appeal that the Bankruptcy Court erred by first determining and stating that this debtor was "absolutely not the kind of person that is reported on 60 Minutes or who has abused the system." *DECISION OF THE BANKRUPTCY COURT, RENDERED FEBRUARY 8, 1994,* this volume, page 1a. This argument is supported by case law from both the Tenth Circuit and the U.S. Supreme Court that prohibits Courts from extending the authority of statutes and directing Courts to construe the Bankruptcy Code liberally for the debtor.

And since the Tenth Circuit Court of Appeals has ruled that the very purpose of bankruptcy is "to relieve the honest debtor from the weight of oppressive indebtedness" *Beneficial Finance Company of Oklahoma v. Sidwell,* 382 F.2d 275 (1967), at 276, denying discharge to a debtor who is obviously not dishonest would be contrary to the spirit and intent of the Bankruptcy Act and forbidden in the Tenth Circuit. This is one of the primary issues and arguments presented on this appeal, and has yet to be addressed.

Indeed, denying discharge to a student debtor, who is established as not being one of the abusive student debtors targeted by the legislative intent of Congress in enacting 11 U.S.C. § 523(a)(8)(B), would be extension of its construction. And "it is pertinent to observe that statutory provisions regulating discharges are remedial in nature; they should be construed liberally with the purpose of carrying into effect the legislative intent, and that the statutory grounds for opposing a discharge should not be extended by construction" *Gross v. Fidelity & Deposit Co. of Maryland,* 302 F.2d 338 (1962). In other words, this would be tantamount to "convicting someone of a crime on the basis of conduct that does not constitute the crime", which would be offensive to "the basic

notions of justice and fair play embodied in the Constitution" *US v. Briggs*, CA5 (Tex.) 1991, 939 F.2d 222.

Indeed, the US Supreme Court has further established that:

> . . . we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be 'fair and equitable and feasible'. Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part. *Securities and Exchange Com'n v. United States R. & Imp. Co.*, 60 S.Ct. 1044 (1940), at 1054.

And the Supreme Court has further ruled that courts may not extend statutes to include cases or acts that are not specifically targeted by the legislature, or cases or acts that militate against established principles of justice -- even if the language of the statute might be exploited to seemingly authorize such a construction:

> [In] a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute. *Rector, Etc., of Holy Trinity Church v. US*, 12 S.Ct. 511 (1892), at 516.

11 U.S.C. § 523(a)(8)(B) contains just such "general language", referred to in that citation as being "broad enough to

reach cases and acts which . . . could not have been intentionally legislated against." *Id.* That "general language" is the phrase "undue hardship". And what is "undue hardship"? First, there are liberal constructions and approaches to application of the phrase:

> In the case of *New York State Higher Educational Services Corporation v. Moore,* 18 CBC 646 (W.D.N.Y. 1978) the Court ruled that: "'undue' means 'inappropriate or unsuitable, not extraordinary' and that 'hardship' means 'hard to bear.'" as cited in *In re Bagley,* 4 BR 248 (1980), at 250. (See also *In re Savercool,* 51 B.R. 180 (Bkrtcy. 1985) and *In re Ford,* 22 B.R. 442 (1982).)

and:

> [11 U.S.C. § 523(a)(8)] was designed to remedy an abuse by students who, immediately upon graduation, would file bankruptcy to secure a discharge of educational loans. . . . [Congress] did not intend to deprive those who have truly fallen on hard times of the "fresh start" policy of the new Bankruptcy Code. *In re Lawson,* 10 B.R. 477 (1981).

and:

> [The] court must, therefore, strike a balance between the concerns of Congress for those cases of extreme abuse of student loans and the principles of fresh start and equality associated with bankruptcy relief. *Ford,* at 444-445.

Then there are strict constructions and applications:

> Requiring this debtor to repay this debt will constitute a hardship, perhaps a considerable hardship, but will not place upon him or any of his dependents a hardship which is "undue" within the meaning of the Bankruptcy Code. *In re Bell,* 3 C.B.C.2d 471 (B.Ct., N.D.Ga. 1980)

and:

> . . . the dischargeability of student loans should be based upon the certainty of hopelessness. *In re Briscoe,* 16 B.R. 128 (S.D.N.Y. 1981), at 131

and:

> [Debtors must be] severely disadvantaged economically as a result of unique factors which are so much a part of a bankrupt's life, present and in the foreseeable future, that the expectation of repayment is virtually nonexistent, unless by that effort the bankrupt strips himself of all that makes life worth living. *In re Kohn,* 5 Bankr.Ct.Dec. (CRR) 419 (Bankr.S.D.N.Y. 1980), at 424.

and:

> "Undue hardship" means something more than an inconvenience or doing without what most would regard as luxuries. *ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,* this volume, 13a.

These strict constructions and definitions of "undue hardship" by Courts are contrary to the settled principles of Bankruptcy and are contrary to the established intent of Congress. They are then invalid, particularly in the Tenth Circuit, the Court of Appeals for which long ago established that in order to further the legislative intent behind the Bankruptcy Act exceptions to discharge "should be strictly construed against a creditor and in favor of the debtor's right of discharge" *Matter of Vickers,* 10th Cir., 577 F.2d 683 (1978), at 687; and: "It is settled law that the Bankruptcy Act . . . is to be liberally construed in favor of a bankrupt." *Johnson v. Bockman,* 10th Cir., 282 F.2d 544 (1960); *McMullin v. Todd,* 10th Cir., 228 F.2d 139; *Dixon v. Lowe,* 10th Cir., 177 F.2d 807.

This is such a basic and settled principle of bankruptcy that the US Supreme Court has based numerous rulings on it, going back to 1892, when it ruled that "nothing is better settled than that

statutes should receive a sensible construction, such as will effectuate the legislative intention [of providing a fresh start], and, if possible, so as to avoid an unjust or an absurd conclusion" *Lau Ow Bew v. US,* 12 S.Ct. 517 (1892), at 520. The Supreme Court further dictated in a later case: "The Bankruptcy Act is to be equitably interpreted to accomplish its evident purposes", paramount among those being "to give the debtor a new opportunity in life and a clear field for further effort, unhampered by the pressure and discouragement of preexisting debt.", *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). Nowhere does it say "the courts should not construe the code liberally if the debtor owes student loans", and it would be ludicrous to assert such an exception.

Put more metaphorically, "Congress intended the Bankruptcy Code as a shield for debtors, not a sword for creditors." *In re R.N. Salem Corp.,* 29 BR 424 (D.C. 1983), at 429.

Clearly, the dictates of superior courts expressly mandate that the duty of bankruptcy courts is to go out of their way -- in a reasonable sense -- to find ways to discharge honest debtors.

And since "liberal" is defined in legal terms as "Free in giving; generous; not restrained or narrow-minded; not literal or strict" *Black's Law Dictionary* 916 (6th ed. 1990), then further imposition by individual courts of conditions that prevent discharge of debtors who were not targeted by Congress cannot possibly be seen as "liberally" construing the Bankruptcy Act in favor of the debtor -- in fact, that would plainly be "liberally" construing the Bankruptcy Act heavily in favor of the creditor, and would be contemptuous of Tenth Circuit and United States Supreme Court law. Conversely, under a proper, liberal application in favor of the debtor, a debtor who establishes that he is not one of the student loan debtors attempting to abuse the Code to avoid paying his student debt should clearly be entitled to discharge.

Again, the Congressional record supplies another specification upon which the courts can base a liberal application: the mandate that a debtor can be discharged if his level of income -- without specification as to amount -- is insufficient to "maintain the debtor and his dependents, at a minimal standard of living *within their management capability*, as well as to pay the

educational debt." *Report of the Commission on the Bankruptcy Laws of the United States,* H.R. Doc. no. 137, 93rd Cong., 1st Sess., Pt. II, 140 (Appendix 2) (1973), at 141 [emphasis added]. "Within their management capability", is a phrase that provides the court with a great deal of leeway to use in effectuating congressional purpose -- and disregard of that mandate in order to impose more strict standards, such as poverty level standards, or the necessity of some form of mental or physical incapacity, would be contrary to the fundamentals of bankruptcy.

Consequently, there is no place in these proceedings under 11 U.S.C. § 523(a)(8)(B) for the strict constructions and definitions of the statutes and its terms, particularly in light of the legislative history of this statute.

None of the presently used methods of determining dischargeability under 11 U.S.C. § 523(a)(8)(B) faithfully apply the directions of the legislative body, which provided a great many clues both as to why this law was created and how it was intended to be applied. Many Courts, responding to an emotional issue, have since applied this statute in ways that are contrary both to legislative intent and to the settled principles of bankruptcy adjudication. Among the rulings that have extended the authority of this statute and that have supported creditors' exploitations of this statute include: exclusion from the seven-year count of 11 U.S.C. § 523(a)(8) those hardship deferments that represent good-faith efforts of debtors -- and that are documented evidence of hardship; restarting the seven-year count when loans are consolidated; the "age" of the debt is inconsequential under the "undue hardship" determination; the size of the debt is inconsequential; poverty-level living standards are necessary for "undue hardship"; etc.

This statute has been used by creditors -- both private institutions and public agencies -- as a "sword" against debtors, to fight for the exception to discharge of educational loans in general. The Courts have too often supported and rationalized this exploitation, supported by various fallacies. This Court should grant certiorari to finally establish a definition of "undue hardship" and to correct the historical trend toward the strict construction and application of the statute that is contrary to

legislative intent and to this Court's established principles of bankruptcy law.

IV.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER 11 U.S.C. § 523(a)(8)(B) IS UNCONSTITUTIONALLY VOID FOR VAGUENESS.

Petitioner presented at the first level of appeal the question of this statute's possible unconstitutionality because of its vagueness. This is a relevant question, supported by reason and by the law of the land.

The fifth and fourteenth amendments to the United States Constitution guarantee that no citizen shall be denied life, liberty or property without due process of law. The United States Supreme Court has ruled that "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth,* 92 S.Ct. 2701 (1972), at 2709. The United States Code is an anthology of such rules and discharge in bankruptcy is such a benefit.

And unlike other due process protections, the vagueness doctrine invokes due process without the necessity of violation of specific fundamental rights. "A statute may be unconstitutionally vague or overbroad even though no activities prohibited by it are specifically protected by either [the state or federal] constitution. This is so because a vague or overbroad statute . . . violates the due process clauses of both constitutions" *State v. Linares,* 630 A.2d 1340 (Conn. App. 1993), at 1346.

Further, the United States Supreme Court has ruled that Congress must comply with due process requirements in drafting bankruptcy legislation, ruling:

> There is no question, of course, but that the exercise of the bankruptcy power by Congress, as is

> the case with other delegated powers, is subject to the requirement of due process contained in that amendment. *Monongahela Nav. Co. v. U.S.*, 138 U.S. 312, 336, 13 S.Ct. 622, 37 L.Ed. 463; *Hanover Nat. Bank v. Moyses, supra*, 186 U.S. 181, 192, 22 S.Ct. 857, 862, 46 L.Ed. 1113. *Campbell v. Alleghany Corporation*, 75 F.2d 947, at 953.

This Court further defined the vagueness doctrine and described its necessity, ruling that:

> The void for vagueness doctrine stems from the Fifth Amendment's constitutional guarantee of due process. *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id. US v. Forbes*, 806 F.Supp. 232 (D.Colo. 1992).

And:

> . . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 92 S.Ct. 2294 (1972), at 2299.

11 U.S.C. § 523(a)(8)(B) fails to define the term "undue hardship" and Congress failed to include with it any formal guidelines for its determination. At the time of the consideration of 11 U.S.C. § 523(a)(8)(B), Rep. Don Edwards, Chairman of the House Subcommittee on Civil and Constitutional Rights, wrote:

> The undue hardship provision also may create an undue hardship for good faith bankrupts....it will be variously interpreted by different judges

> around the country and even in the same judicial district. *Bankruptcy Law Revision, Report of the Committee on the Judiciary,* 95th Congress, 1st Session, Report No. 95-595, at 154, 155.

Indeed, as Representative Edwards predicted, courts across the country have been left to their own arbitrary determinations of "undue hardship". For example, even in this judicial district the judges cannot seem to agree on application of 11 U.S.C. § 523(a)(8)(B). In the case of *In re Armijo,* 13 BR 175 (1981), the judge applied the "Johnson" test. But in the instant case, the judge did not. Hopefully, we can assume that these judges are of "common intelligence", *(Forbes)* yet because of the law's vagueness, they "differ as to its application". *(Id.)* Across the country, in the published case law pertaining to this statute, the interpretations of this statute vary from court to court and case to case, exemplified by the disagreements over whether or not poverty level standards should be applied, legislative intent, the variations in the tests that are used, and the seemingly random and arbitrary nature of many determinations of hardship. Consequently, 11 U.S.C. § 523(a)(8)(B) falls within this Court's definition of an unconstitutionally vague law.

For some reason, in the absence of a statutory definition, or of some solid statutory basis for determination, many courts have empowered themselves with the very vice that the US Supreme Court has ruled against: that being the ad hoc and arbitrary determination of policy matters. These courts have often applied the tenets of 11 U.S.C. § 523(a)(8)(B) liberally for the creditors, requiring debtors to jump through a myriad of hoops to prove dischargeability -- without even the barest hope of some sort of consistent and just evaluation of the facts. Some courts, without authority, have abetted student loan creditors in their attempts to supersede the clearly established legislative intent of correcting bankruptcy abuse by exploiting 11 U.S.C. § 523(a)(8)(B) to deny discharge of all student loans.

Even in this case, the Bankruptcy Judge expressed the dilemma caused by this unconstitutional vagueness, saying: "it is hard to synthesize an intelligent way through these cases."

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This vagueness allows bankruptcy courts the ability to base determinations of discharge on whatever reason or emotion they prefer, while saying that "undue hardship" doesn't exist. No matter the situation of the debtor, or how convincing the facts may be, the court can rule against them and stand behind their authority to translate as they see fit the phrase "undue hardship".

11 U.S.C. § 523(a)(8)(B) is unconstitutionally vague, allowing courts to apply inconsistent and arbitrary standards for determination of discharge, such as in the instant case, wherein the Bankruptcy Judge failed to apply an accepted test and failed to properly consider important facts, basing denial of discharge on some unknown emotional factor or factors. This Court should grant certiorari to review this statute and its vague language to consider its constitutionality.

CONCLUSION

The Petitioner needs this Court's review for the first fair hearing of the issues presented on appeal. Additionally, this case represents this Court's opportunity to finally and definitively rule on the application of 11 U.S.C. § 523(a)(8); to define "undue hardship"; to order a method for determination of dischargeability; to correct a judicial trend that is contrary to this Court's established law; and to consider the constitutionality of this statute. This review is necessary to ensure the fair, equitable and consistent application of this statute in all Courts in all Circuits of this nation's judicial system.

Respectfully submitted,

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APPENDIX A — DECISION OF THE BANKRUPTCY COURT, RENDERED FEBRUARY 8, 1994.

CASE NO. 7-93-12873 R
ADV. PRO. NO. 93-1288 R

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW MEXICO

In re
MICHAEL AND MELISSA CUENCA,
Debtors.

MICHAEL CUENCA

vs.

U.S. DEPT. OF EDUCATION

PARTIAL TRANSCRIPT OF PROCEEDING TRIAL ON THE MERITS FINDINGS OF FACT

BE IT REMEMBERED that the above-entitled matter came on for hearing before the Honorable Stewart Rose, United States Bankruptcy Judge, at the hour of 1:30 p.m. on Tuesday, February 8, 1994, in Albuquerque, New Mexico.

APPEARANCES

For the Plaintiff: Pro Se
For the Defendant: Marilyn Page
Also Present: Anita Bardtrief

(Partial Transcript.)

THE COURT: Okay. Well, I'm going to rule that the student debt is nondischargeable. I wish I could find a way to compromise this case. Mr. Cuenca, you mentioned something about the department not passing the buck, inquiries from senators got back

forms and so on. I have had some experience in cases where that has, indeed, been the case.

So the first thing that came to my mind is just exactly what can I do in a case like this to reflect a ruling that would effect the kind of compromise that I would like to see. And I guess I have to pass the buck, too, because I'm not in a position where I am entitled to make such a ruling. I will, however, have a suggestion in that context in a minute. Okay.

Every case of a student loan is very different, and it is hard to synthesize an intelligent way through these cases. I recollect the case of the lady who got a masters in fine arts from the University of New Mexico College of Fine Arts, which equipped her to be the secretary to the faculty at something slightly over minimum wage. I discharged that loan.

I had a difficult case not too long ago in which an able-bodied young man, with an extremely capable wife with a responsible job, had been to Vietnam, and whatever baggage he carried back from Vietnam was such that he couldn't keep a job. It's not that he wouldn't want to. It's just that he just wasn't going to work. I discharged that loan.

On the other hand, I had dinner last Saturday night with a gentlemen slightly older than I am. I'm not going to put his name on the record. I had dinner with an author, slightly older than I am, and he doesn't make a heck of a lot of money with his books. He has had six now, but he is getting published, and I can't imagine how long it has taken him to get to that point, but he got there.

I next think of my daughter who got a bachelor's in creative writing from the University of Utah. She got a job, started working the day after graduation, and she has been able to find good employment in that field to the point where sometimes I have wondered about her health. She works herself to death, and she, all of a sudden, found herself in a very uncomfortable situation, and she had to bite the bullet and leave that job. It was a very, very good job. Fortunately, her new job pays more and is much more rewarding, and she was able to cope with it, but not without her parents having white knuckles an awful lot of the time.

She has now got a baby, and somehow she didn't have the problems that you had with employment, Mr. Cuenca, but on the other hand, I think it's just the luck of the draw. I think you are extremely articulate. So let me get into some of the merits of the case. I appreciate the budgetary constraints that you have been under. I have no doubt of your good faith, and you are absolutely not the kind of person that is reported on 60 Minutes or who has abused the system.

In fact, if you are to be faulted, it is that you are too articulate, and you got yourself in the uncomfortable position of having shouldered the responsibilities and having been able to, by being articulate, secure these deferments, which, but for a few years and a couple of deferments, might have gotten you out of the woods.

You said that you were backed into a corner, and I appreciate the fact that it is extremely difficult to deal with a bureaucracy, but I think you have been able to deal with it so far. And I think that you can in the future. Because even though it is not within my province to require that a payment schedule be reasonable, even though I can't require that, I have an abiding conviction that if anybody can secure that, you can. I do expect it. And if it doesn't occur, I think there are remedies.

The size of the debt is a consideration which I am not to consider. It's not up to me to worry about the size of your debt. Well, on the other hand, I know that you do, and it's obvious that you would not have spent as much time preparing for this case and doing the research you have done if this thing wasn't eating you alive. I know it. You know it, but I can't solve that problem.

Some people will use a shot of booze. Others would use tranquilizers. Others might talk to a psychologist. I don't know. All I know is that is not something that I can do, and trying to do so isn't appropriate for me. In these cases, I have tried innumerable times to come up with some hard and fast rulings.

In doing so, I have discussed this with counsel for a number of the institutional lending agencies, and not to sour their private opinions, but to ask them what procedures they utilized. And I

have come up with this poverty level approach. As a matter of fact, we don't have those cases anymore. If it is a current poverty level situation, they are not litigated. The institution gives up. The hard facts we have got here are that one, you have been able to reestablish your credit, and I thank God for that. You are able to buy a car. You did it on a short budget. I am not saying that I look kindly upon the methods of financing automobiles, but I now know that you have credit. So that is a good result of the bankruptcy.

I secondly know that you are not burdened with a number of old debts. That helps. I have no quarrel with your wife not working, and I can well imagine that underemployment is symptomatic in New Mexico, particularly of Santa Fe. I agonize with you about a job with a fledgling magazine. I tried a case in Miami, Florida, about a year ago, in which I learned more than I wanted to know about publishing magazines. And I had to enter a judgment against an individual to determine a debt of $28 million to be nondischargeable. It's rough out there.

But your current income is $36,000, and I think you are worth it, and I think that whatever you do, you will be able to get back to that level if you lose this job. If you keep this job, I think as time goes on, trying to cope with this problem would be easier. It's true that the day you start out with a degree and no job, you have nothing and you owe nothing, and you wonder if you ever will have anything. Well, it does come with time, and you will.

I think that you have got a benefit from your education, because I hope you will write a book. I hope you don't write it about this. There ought to be better things to write about. I certainly saw enough of it in the pleadings. You might end up having to do what my daughter did. Just before she left the firm she was with, she had to write a farewell speech for the president, because he got the ax just before she did. It's going to work out.

Having said all of those things, I suppose that this case could have been handled a little bit differently, depending on the timing. I forgot when the amendment went into effect which barred discharging student loans in Chapter 13. I'm not going to worry

about how the case has been conducted to this point, nor am I going to try to stretch it. But I can tell you that the U.S. Supreme Court has recently countless successive bankruptcies, Chapter 7 followed by a Chapter 13.

If, in fact, the Department of Education were to back you into a corner, I suspect that you could turn right around and file a Chapter 13. And that is something that I can do something about. I suspect that that would give you the potential of not a five-year deferment, but a payment schedule over a period of five years that might, indeed, give you the surcease that I expect the department to give you .

I also know that if you file another bankruptcy, a Chapter 7 perhaps, and after all the periods of deferment have expired and seven years is expired, you can get a discharge then. I don't expect any of those extraordinary things are going to be necessary, and I don't think, Mr. Cuenca, that you ought to devote your life to worrying about these things. Ms. Page and Ms. Bardtrief are pretty realistic people, and I trust that they will be able to sit down with you and discuss all of the different possibilities and get you some piece of mind, so you can go back to work and make modest payments, and as things get better for you, to be able to make better payments. You can get out of this situation within some reasonable time, hopefully not to far in the future.

Those are my findings of fact and conclusions of law, and Ms. Page, if you will just draw a form of judgment, and it need not recite any findings or conclusions, and send Mr. Cuenca a courtesy copy, but I will not require signature. There are no costs in this case. Thank you, folks.

(End of Partial Transcript.)

****

CERTIFICATE

I, Amy L. Kincaid, a Certified Court Reporter, do hereby certify that the Proceedings of the above-entitled cause were reported by me stenographically on Tuesday, February 8, 1994,

and that the within transcript is a true and accurate transcription of my shorthand notes.

I further certify that I am neither an attorney nor counsel for, nor related to or employed by any of the parties to the action, and that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

s/ Amy L. Kincaid, CCR
Notary Public

My Commission expires: 3/1/97

APPENDIX B — OPINION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

Civ. No. 94-293 JP/WWD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MICHAEL R. CUENCA,
Plaintiff,

vs.

UNITED STATES DEPARTMENT OF EDUCATION,
Defendant.

MAGISTRATE JUDGE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION

Proposed Findings

1. This matter comes before the Court on appeal from the United States Bankruptcy Court. 28 U.S.C. § 158(a). Plaintiff-Appellant Michael Cuenca ("Cuenca") appeals from a judgment entered in Adversary Proceeding No. 93-1288 R after a trial on February 8, 1994 to determine the dischargeability of Cuenca's educational loan. The bankruptcy judge found that Cuenca's student loan is nondischargeable under 11 U.S.C. § 523(a)(8)(B).

2. Cuenca raised a number of arguments as error, but in essence he contends that the bankruptcy court erred in finding that the facts of this case do not establish "undue hardship," as that term is used in 11 U.S.C. § 523(a)(8)(B).

3. That portion of the statute states that student loans are nondischargeable in bankruptcy unless failure to discharge the loan would "impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8)(B).

4. The term "undue hardship" is not defined in the Code. It is a term of art which the bankruptcy court interprets in its discretion. In re Reyes, 154 B.R. 320, 322 (Bankr. E.D. Okl. 1993). Whether "undue hardship" exists is a question of fact to be determined by

the particular facts of each case. *Id.* Questions of fact are reviewed under the clearly erroneous standard. In re Mullet, 817 F.2d 677, 678 (lOth Cir. 1987). The burden of proof of "undue hardship" is on the debtor. In re Reyes, id.

5. The facts are as follows. Cuenca graduated cum laude from college in 1981, and received a master's degree in an honors program in special studies in 1985. He was accepted to Navy flight training in 1985 or 1986, but he declined it. He was earning $21,500 a year as a public relations specialist in 1986, but voluntarily left that job to go work in San Diego for a video company. From September 1991 until 1992, Cuenca earned approximately $34,000 a year. At the date of trial, he was earning $36,000 a year. Cuenca had a period of temporary disability, but is in good health and had no disability at the time of trial. In 1993, he sold a couple of magazine articles for $500 each, and is attempting free-lance writing. Cuenca's wife has a bachelor's degree in psychology, and previously earned about $18,000 a year. At the time of trial, by agreement of the couple, she was not employed, and was staying at home to care for their three year old child. The Cuencas spend $27 a week on babysitting services. When Cuenca received a raise in November 1993, he bought a new Chrysler minivan, to replace an eleven year old Honda with 170,000 miles. Cuenca consolidated his government educational loans, taken out between 1981 and 1985, on March 15, 1989. Cuenca has made no payments on the consolidated note for his indebtedness of $37,724.02 on the educational loans. His income has increased from $5,000 to $36,000 a year.

6. Plaintiff states that only one fact is in dispute, that concerning the amount of his debt. He asserts the bankruptcy judge erred in stating that he "is not burdened by a number of old debts." Although Cuenca stipulated at trial that the amount of indebtedness on his consolidated educational loans is $37,724.02, he argues that his "debts", as set out in his Memorandum supporting his complaint, were $57,484.11, and at the time of trial had increased to $73,634.50. There was, however, no testimony to that effect at the hearing, but rather Cuenca testified that the bankruptcy petition that he filed in 1991 and the relief received

[from it] is helping him and his family. Transcript of Trial Proceeding, pp.19-20. He stated that if they have to address the educational loan debt, it would stop their progress and position, and put them in a position of not being able to pay for their children's college education. *Id.*

7. In his findings, the bankruptcy judge stated: "[B]ut I now know that you have credit. So that is a good result of the bankruptcy. I secondly know that you are not burdened by a number of old debts. That helps." Tr. 28. I interpret the bankruptcy judge's comment that Cuenca is not burdened by a number of old debts to refer to the relief Cuenca received from his bankruptcy proceeding in 1991.

8. The bankruptcy judge correctly ruled that Cuenca has been able to reestablish his credit, to buy a car, and to do so on a short budget. As a result of the bankruptcy Cuenca filed in 1991, he is not burdened with a number of old debts. The judge found that Cuenca earns $36,000 a year, that his wife is not working, and that he has derived a benefit from his education. Findings of Fact, pp. 2-8.

9. Oral argument is not necessary to the determination of this appeal.

10. I cannot say that the bankruptcy judge's findings of fact are erroneous, much less clearly erroneous. The bankruptcy judge correctly ruled that repayment of Cuenca's student loan would not constitute an undue hardship on him or his dependents.

11. Within ten days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. §636(b)(1), file written objections to such proposed findings and recommendations.

Recommended Disposition

I recommend that the judgment of the bankruptcy court be affirmed.

s/ William W. Deaton
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — PETITIONER'S OBJECTION TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMEND DISPOSITION

No. CIV94-0293 JP/WWD
Bkrtcy. No. 7-93-12873 R
Adv. Pro. No. 93-1288 R

UNITED STATES DISTRICT COURT
District of New Mexico

In Re:

MICHAEL R. CUENCA
MELISSA L. CUENCA
1935 ALABAMA
LAWRENCE, KS 66046
Debtors,

MICHAEL R. CUENCA
Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION
400 MARYLAND AVE. SW
WASHINGTON, DC 20202
Defendant.

APPELLANT'S OBJECTION TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

The Appellant vehemently objects to the *MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION* in this appeal. These findings and recommendations are based on the gross oversimplification of this appeal and the complete disregard of the valid, stated issues on appeal. Acceptance by the District Judge of these findings and

recommendations would be a serious error and contemptuous of the Tenth Circuit Court of Appeals.

Regardless of the assertions of the Appellee and the Magistrate Judge, this appeal does not revolve around the findings of fact of the Bankruptcy Judge. In fact, the Bankruptcy Judge's Findings of Fact support the issues presented on this appeal. (See *APPELLANT'S BRIEF*, pg. 17, et sqq., pg. 25, et sqq.; and *APPELLANT'S REPLY BRIEF*, ppg. 1-4).

The issues on appeal in only one instance dispute the findings of fact of the Bankruptcy Judge; that instance being whether the Bankruptcy Judge erred in declaring that the plaintiff/debtor was not burdened with a number of old debts. That was clearly erroneous, and contrary to the findings of the Magistrate Judge, evidence to that effect was provided in the schedules of debt supplied with the plaintiff/debtor's *MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY*, appeal record, volume 1, item 3.

Again, this is the sole dispute as regards the findings of fact in this appeal. The true, valid issues on this appeal, as listed in the *APPELLANT'S DESIGNATION OF RECORD AND STATEMENT OF ISSUES PURSUANT TO BANKRUPTCY RULE 8006*, filed on or about March 25, 1994 and listed again and argued in the *APPELLANT'S BRIEF*, filed on April 28, 1994, ppg. i-ii, ppg. 1-2, resolve around the *conclusions of law and statutory authority* of the Bankruptcy Judge to deny discharge in this case -- based on his findings of fact and the facts of the case. The recommendation of the Magistrate Judge to disregard these true issues is capricious and the further recommendation to affirm the decision of the Bankruptcy Judge is based on a discussion of evidence and issues irrelevant to this appeal. Both recommendations should be disregarded by the District Judge.

The issue of appellate authority and review regarding conclusions of law is clearly settled. Conclusions of law are reviewed *de novo*. *Virginia Beach Federal Savings and Loan Ass'n v. Wood*, 901 F.2d 849, 851 (10th Cir.1990); *In re Schneider*,

864 F.2d 683, 685 (10th Cir.1988). The issues designated by the appellant questioning the Bankruptcy Judge's conclusions of law are valid, are well taken, and must be duly considered by the District Court.

Further, even though the oversimplification of the appeal by the Magistrate Judge is erroneous, the Bankruptcy Judge did clearly err in denying discharge to a debtor who was -- in so many ways -- clearly not a debtor targeted by the legislative intent behind 11 U.S.C. § 523(a)(8). As discussed in the *APPELLANT'S BRIEF*, pg. 17, et sqq., the US Supreme Court has clearly limited the authority of the courts to the authority clearly stated in the statute and/or the intentions of Congress in enacting the statutes. It is also clearly settled that the intent of Congress in enacting 11 U.S.C. § 523(a)(8) was to stop the abuse of the Bankruptcy Code by students: "with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after leaving school and before any loans became due" *Bankruptcy Law Revision, Report of the Committee on the Judiciary*, 95th Congress, 1st Session, Report No. 95-595, at 133. The debtor in this case is clearly not one of those students -- as the Bankruptcy Judge found and declared at trial (*Transcript of Proceedings*, dated February 8, 1994, at 23, line 19) -- therefore the Bankruptcy Judge clearly erred by extending his authority to include denial of discharge to someone outside the scope of the statute. (See *APPELLANT'S BRIEF*, pg. 17, et sqq., pg. 25, et sqq.; and *APPELLANT'S REPLY BRIEF*, ppg. 1-4.)

In addition, the Appellee, in their ANSWER BRIEF OF APPELLEE, made no effort to address the stated issues on appeal, thereby failing to deny the averments or arguments supporting the issues on appeal, which constitutes an admission of the averments, per Rule 8(d) F.R.Civ.P. (See *APPELLANT'S REPLY BRIEF*, ppg. 1-4.) Therefore, the Court should rule as requested by the Appellant.

The appellant respectfully requests that the District Judge disregard the recommendations of the Magistrate Judge and consider fully the Appellant's appeal of the Bankruptcy Judge's conclusions of law. Based on the issues presented on appeal, on

the arguments presented in the *APPELLANT'S BRIEF*, on the arguments presented in the *APPELLANT'S REPLY BRIEF*, and on the arguments presented herein, the appellant respectfully requests that the District Judge reverse the decision of the Bankruptcy Court and discharge completely the debt owed by the plaintiff/debtor to the US Department of Education.

Respectfully submitted,

s/ Michael R. Cuenca, Appellant
1935 Alabama
Lawrence, KS 66046
913-842-8954

APPENDIX D — UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ORDER ADOPTING MAGISTRATE JUDGE'S RECOMMENDATIONS.

Civ. No. 94-293 JP/WWD

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MICHAEL R. CUENCA,
Plaintiff,

vs.

UNITED STATES DEPARTMENT OF EDUCATION,
Defendant.

ORDER

THIS MATTER having come before the Court on the proposed findings and recommended disposition of the United States Magistrate Judge, and objections to the proposed findings and recommended disposition having been filed, and the Court having made a de novo determination of those portions of the Magistrate Judge's proposed findings and recommended disposition objected to;

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court.

IT IS FURTHER ORDERED that the judgment of the Bankruptcy Court is affirmed.

s/ James A. Parker
United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 94-2277
(D. C. No. CIV 94-293)
(D. N.M.)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL R. CUENCA,
Plaintiff-Appellant,
v.
DEPARTMENT OF EDUCATION,
Defendant-Appellee.

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Cuenca, a pro se litigant, appeals a bankruptcy court decision that found Mr. Cuenca's student loans nondischargeable under 11 U.S.C. § 523(a)(8)(B).[1]

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[1] The applicable portion of the statute provides that a student loan is nondischargeable in bankruptcy unless the failure to discharge the loan would "impose an undue hardship on the debtor and the debtor's dependents."

Appendix E

This is not the first time we have written concerning this appeal. Mr. Cuenca originally asked permission to proceed in forma pauperis. We denied permission to proceed in forma pauperis finding:

Mr. Cuenca currently earns an annual salary between $30,000 and $37,000 with which he supports himself, a spouse, and a child. He rents his home and owes payments on a new vehicle. From this information and the rest of Mr. Cuenca's financial affidavit, it is clear he has the financial ability to pay the required filing fees. Cuenca v. Department of Education, No. 94-2277 (Order & Judgment at 3 (10th Cir. May 15, 1995).

Mr. Cuenca subsequently paid the required filing fee and thus reinstated this appeal. Mr. Cuenca attacks the validity of the bankruptcy court's decision raising two issues, which we quote: (1) "The District Court improperly oversimplified the appeal to ignore the proper and valid issues regarding errors in questions of law raised by the appellant," and (2) "The Bankruptcy Judge clearly erred in several questions of law and mixed questions of law and fact. And the statute upon which this case resolves is unconstitutionally vague."

The significant facts are not in dispute. Mr. Cuenca graduated from the University of Kansas in June 1985, with a Master's degree in creative and critical writing and a student loan indebtedness of $21,500 repayable at seven per cent interest over ten years. The schedule required 115 payments of $255 per month with a final payment of $352.40. Mr. Cuenca failed to make any payments. As of the hearing date in bankruptcy court, Mr. Cuenca owed a total of $37,724.02.

Mr. Cuenca filed an adversary proceeding and a trial on the merits was held. The bankruptcy judge ruled the student loan in the amount of $37,724.02 was nondischargeable. The judge found Mr. Cuenca earned $36,000; his wife was not working; he was not burdened with a number of old debts; and he had derived a benefit from his education.

On appeal to the district court, the case was referred to the magistrate judge who opined he could not say the bankruptcy

judge's findings of fact were erroneous, much less clearly erroneous, and the bankruptcy judge correctly ruled that repayment by Mr. Cuenca of his student loan would not constitute an undue hardship on him or his dependents. The magistrate judge recommended that the judgment of the bankruptcy court be affirmed. The district judge, over Mr. Cuenca's objections, adopted the proposed finding and conclusions of the magistrate judge.

The essence of Mr. Cuenca's argument is found in the remarks of the bankruptcy court apparently made at the conclusion of the contested hearing. There the bankruptcy judge stated: "I have no doubt of your good faith, and you are absolutely not the kind of person that is reported on 60 Minutes or who has abused the system." As Mr. Cuenca argues, "This is tantamount to finding a defendant not guilty of murder and then sentencing him to a life prison anyway." Stated differently, Mr. Cuenca asserts there exists an irreconcilable difference between the quoted remarks of the bankruptcy judge and the bankruptcy judge's conclusion that neither he nor his dependents would suffer an undue hardship. Mr. Cuenca's primary argument at trial was that if he had to pay his educational debt, he probably would not be able to pay the cost of his three-year-old child's college education.

There is no definition of "undue hardship" in the bankruptcy code. We need not fashion a test under the facts of this case. Mr. Cuenca's income is not at or below poverty level. Many families would be envious of his annual income. Mr. Cuenca has identified no unique and extraordinary circumstance that would warrant the nonpayment of his student loan. "Undue hardship" means something more than an inconvenience or doing without what most would regard as luxuries. Student loans are different from most loans. They are made without the usual protections given to a lender. Repayment is expected solely from the debtor's future increased income resulting from the education. Consequently, the discharge of a student loan should be based upon an inability to earn and not simply a reduced standard of living.

We further note Mr. Cuenca's good faith is not an issue. The sole question is the existence or nonexistence of undue hardship.

We do not address Mr. Cuenca's constitutional argument as it was not supported with any reasoned argument, nor was it supported with any applicable law, nor was it appropriately raised. Were we to consider the argument, we would have no difficulty pronouncing the bankruptcy statute, 11 U.S.C. § 523(a)(8)(B), constitutional.

The judgment of the district court is AFFIRMED.

Entered for the Court:

WADE BRORBY
Circuit Judge

APPENDIX F — PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

No. 94-2277

UNITED STATES COURT OF APPEALS
Tenth Circuit

MICHAEL R. CUENCA
Plaintiff/Appellant,

vs.

UNITED STATES DEPARTMENT OF EDUCATION
Defendant/Appellee.

PETITION FOR REHEARING/SUGGESTION FOR REHEARING IN BANC

PETITION FOR REHEARING

Michael R. Cuenca, Plaintiff/Appellant Pro Se, initiated an adversary proceeding under 11 U.S.C. §523(a)(8)(B) for the determination of the dischargeability of his student loan in his bankruptcy. 11 U.S.C. § 523(a)(8) excepts from discharge in bankruptcy any debt:

> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless --
>
> (A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of

> the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

But what is "undue hardship"? The Congress presented no definition of it meant for the phrase to represent. Consequently, the courts, in order to prevent the arbitrary use of the statute to deny discharge, developed several accepted tests that have been and are being used widely, including throughout the Tenth Circuit, for the determination.

At trial, Cuenca argued that he fulfilled the necessary criteria of the usual three-prong tests -- including the "Johnson" test previously used in the US Bankruptcy Court for the District of New Mexico -- for determining dischargeability under 11 U.S.C. § 523(a)(8)(B). The United States Bankruptcy Court recited findings of fact that, indeed, confirmed that argument, but the Court failed to then follow the usual tests and ruled the debt to be nondischargeable. Plaintiff/Appellant appealed the decision to the United States District Court for the District of New Mexico, which ignored the eight issues properly presented on appeal, including a well-supported constitutional question, then accepted the assertion by the US Attorney that the judgment itself comprised a finding of fact and was subject to reversal only upon showing of clear error, and affirmed the decision of the Bankruptcy Court. Plaintiff/Appellant appealed the decision to the United States Court of Appeals for the Tenth Circuit and that panel also accepted the Appellee's arguments, ignored and/or overlooked the Appellant's issues and arguments, and affirmed the decision.

The Plaintiff requests a rehearing in order to receive a fair and just consideration of the issues presented in this appeal. To date, from the District Court to the Tenth Circuit, the appeals courts have refused to respond to these issues that were appropriately raised by the Appellant and have, instead, improperly construed the Bankruptcy Court's judgment as one big finding of fact, falling back on emotional recitations of the evidence presented at trial (which is irrelevant to all but one issue in this appeal) to justify

their agreement with the Bankruptcy Court and affirm the lower courts' decisions without the proper *de novo* review.

But the Tenth Circuit has ruled that "when a lower court's factual findings are premised on improper legal standards or on proper ones improperly applied, they are not entitled to the protection of the clearly erroneous standard, but are subject to *de novo* review." *In re Osborn*, 24 F.3d 1199 (10th Cir. 1994). How can this be determined without the proper consideration of the properly presented issues?

At issue in this appeal is not just whether or not the judges of the appeals courts agree with the Bankruptcy Court's judgment, but how the Bankruptcy Court came to that judgment and how dischargeability under 11 U.S.C. § 523(a)(8)(B) should be determined throughout the Tenth Circuit in a manner that will prevent arbitrary and capricious denials of discharge falling back on various strict constructions of the phrase "undue hardship" and to provide all debtor/plaintiffs an equal opportunity under the law.

Courts have long agreed that judgments are not findings of fact, but are "conclusions of law upon facts found or admitted by the parties or upon their default in the course of the suit", *Allegheny County v. Maryland Casualty Co.*, C.C.A.Pa., 132 F.2d 894, 897; that a decision "at best, was an ultimate finding of fact and, as such, did not constitute 'findings of fact,'", *Wimmer v. Cook*, C.A.4 (W.Va.), 774 F.2d 68, 74.

The decision of a court is a conclusion of law and: "a 'conclusion of law' is [a] decision of [a] court stemming from ultimate factual issues which determine result of dispute in nonjury trial." *O'Shea v. Hatch*, 640 P.2d 515, 520; or, "the final judgment or decree required on basis of facts found or verdict", *Peoples v. Peoples*, 179 S.E.2d 138, 141.

Further, since the case revolves around the vague term "undue hardship", the entire case is reviewable *de novo* because if a "term carries legal implications, determination of whether it has been established in case is 'conclusion of law,' for purposes of

appeal. *Woodruff v. McClellan*, Wash., 622 P.2d 1268; *Para-Medical Leasing, Inc. v. Hangen*, 739 P.2d 717, 722.

The issues properly presented and repeatedly ignored by the appeals courts include:

(1) Contrary to precedent, the Bankruptcy Judge failed to apply or properly apply an accepted test for determining discharge.
(2) The Bankruptcy Judge disregarded important evidence of dischargeability.
(3) The Bankruptcy Judge erred in concluding he had no authority to reduce or define the dischargeable amount.
(4) The Bankruptcy Judge refused to consider the size of the debt as evidence.
(5) The Bankruptcy Judge erred in finding that the debtor has no other debt.
(6) The Bankruptcy Judge extended the authority of 11 U.S.C. § 523(a)(8).
(7) Contrary to Tenth Circuit law, the Bankruptcy Judge construed the Bankruptcy Code liberally for the creditor.
(8) The Bankruptcy Judge's errors of law were made possible by the unconstitutional vagueness of 11 U.S.C. § 523(a)(8)(B).

Thus, the Plaintiff/Appellant presented only one issue concerning an error in a finding of fact (No. 5), one issue questioning the statute's constitutionality (No. 8), and six other issues concerning errors both in the bankruptcy court's application of the statute and the bankruptcy court's conclusions of law. Only one of these issues, No. 5, disputes the Bankruptcy Court's findings of fact. The remaining issues, in fact, rely on and are supported by the stated findings of fact of the Bankruptcy Court. The District Court's affirmation of the bankruptcy court's decision by construing the entire judgment as a finding of fact and then the Tenth Circuit panel's affirmation of those lower courts completely circumvented the issues properly presented by the Appellant in the original appeal and was an error.

Sadly, the panel also expressed in the following statement what could be argued is a showing of extreme prejudice:

> "We do not address Mr. Cuenca's constitutional argument as it was not supported with any reasoned argument, nor was it supported with any applicable law, nor was it appropriately raised. Were we to consider the argument, we would have no difficulty pronouncing the bankruptcy statute, 11 U.S.C. § 523(a)(8)(B), constitutional." *Order and Judgment*, filed Aug. 23, 1995, at 5.

The statement is wrong. The Appellant's constitutional argument is presented on pages 28-32 of the *Appellant's Brief* for the District Court appeal and is supported with no fewer than eight (8) citations, including United States Supreme Court law. This statement seems horribly unjust, for how can any court so vehemently state how it would rule on an argument the court admits it hasn't even considered? The panel's inadvertent misstatement of the Appellant's presentation of the constitutional argument could indicate that the panel did not read the original briefs of the appeal. It could be argued that, based on appearances, the panel inadvertently ruled without properly considering the Appellant's arguments and citations in support of the other aspects of the appeal.

The Plaintiff/Appellant respectfully requests a rehearing for a determination made specifically and solely on the issues presented in this appeal.

SUGGESTION FOR REHEARING IN BANC

The Plaintiff/Appellant in the above-referenced appeal respectfully suggests the appropriateness of a rehearing in banc of the decision affirming the lower courts by a panel of the 10th Circuit Court of Appeals, as authorized by both FRAP 35(a)(1) and FRAP 35(a)(2).

Appendix F

Applicability of FRAP 35(a)(1):

This request is based on a belief that the panel decision is contrary to the following decisions of the United States Supreme Court and of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

The Tenth Circuit panel's judgment is contrary to the following DECISIONS OF THE UNITED STATES SUPREME COURT:

Gleason v. Thaw, 35 S.Ct. 287 (1916), at 289: "Exceptions to the operation of a discharge thereunder [the Bankruptcy Code] should be confined to those plainly expressed." Cited as support for issue No. 6 in *Appellant's Brief* for the District Court appeal, page 18.

Wilbur-Ellis Company v. Kuther, 84 S.Ct. 1561 (1964), at 1560: "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective congressional purpose". Cited as support for issue No. 6 in *Appellant's Brief* for the District Court appeal, page 18.

Royal Indemnity Co. v. American Bond & Mortg. Co., 53 S.Ct. 553: "We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress". Cited as support for issue No. 6 in *Appellant's Brief* for the District Court appeal, page 18.

Lau Ow Bew v. US, 12 S.Ct. 517 (1892), at 520: "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion". Cited as support for issues No. 6 and No. 7 in *Appellant's Brief* for the District Court appeal, pages 18 and 25.

Williams v. U.S. Fidelity & Guaranty Co., 35 S.Ct. 289 (1914), at 290: "It is the purpose of the bankruptcy act to . . . relieve the honest debtor from the weight of oppressive

indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 19.

Rector, Etc., of Holy Trinity Church v. US, 12 S.Ct. 511 (1892), at 511: "In construing a doubtful statute the court will consider the evil which it was designed to remedy, and for this purpose will look into contemporaneous events, including the situation as it existed, and as it was pressed upon the attention of the legislative body, while the act was under consideration." Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 19.

Securities and Exchange Com'n v. United States R. & Imp. Co., 60 S.Ct. 1044 (1940), at 1054" ". . . we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be 'fair and equitable and feasible'. Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part." Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 23.

Rector, Etc., of Holy Trinity Church v. US, 12 S.Ct. 511 (1892), at 516: "[In] a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 23.

Appendix F

Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934): "The Bankruptcy Act is to be equitably interpreted to accomplish its evident purposes", paramount among those being "to give the debtor a new opportunity in life and a clear field for further effort, unhampered by the pressure and discouragement of preexisting debt." Cited as support for issue No. 8 in *Appellant's Brief* for the District Court appeal, page 26.

Board of Regents of State Colleges v. Roth, 92 S.Ct. 2701 (1972), at 2709: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Cited as support for issue No. 8 in *Appellant's Brief* for the District Court appeal, page 29.

Monongahela Nav. Co. v. U.S., 138 U.S. 312, 336, 13 S.Ct. 622, 37 L.Ed. 463; Hanover Nat. Bank v. Moyses, *supra*, 186 U.S. 181, 192, 22 S.Ct. 857, 862, 46 L.Ed. 1113. *Campbell v. Alleghany Corporation*, 75 F.2d 947, at 953: "There is no question, of course, but that the exercise of the bankruptcy power by Congress, as is the case with other delegated powers, is subject to the requirement of due process contained in that amendment." Cited as support for issue No. 8 in *Appellant's Brief* for the District Court appeal, page 29.

Grayned v. City of Rockford, 92 S.Ct. 2294 (1972), at 2299: ". . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Cited as support for issue No. 8 in *Appellant's Brief* for the District Court appeal, page 30.

Bank of Marin v. England, 87 S.Ct. 274 (1966), at 277: "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction". Cited as support

for issue No. 1 in *Appellant's Brief* for the District Court appeal, page 7.

The Tenth Circuit panel's judgment is contrary to the following DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS:

Johnson v. Bockman, 10th Cir., 282 F.2d 544 (1960); *McMullin v. Todd*, 10th Cir., 228 F.2d 139; *Dixon v. Lowe*, 10th Cir., 177 F.2d 807: "It is settled law that the Bankruptcy Act . . . is to be liberally construed in favor of a bankrupt." Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 25.

Matter of Vickers, 10th Cir., 577 F.2d 683 (1978), at 687: [exceptions to discharge] "should be strictly construed against a creditor and in favor of the debtor's right of discharge". Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 25.

Jones v. Gertz, 10th Cir., 121 F.2d 782: "the reason for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural." Cited as support for issue No. 1 in *Appellant's Brief* for the District Court appeal, page 8.

Beneficial Finance Company of Oklahoma v. Sidwell, 382 F.2d 275 (1967), at 276: [the very purpose of bankruptcy is] "to relieve the honest debtor from the weight of oppressive indebtedness". Cited as support for issue No. 7 in *Appellant's Brief* for the District Court appeal, page 22.

In re Osborn, 24 F.3d 1199 (10th Cir. 1994): "when a lower court's factual findings are premised on improper legal standards or on proper ones improperly applied, they are not entitled to the protection of the clearly erroneous standard, but are subject to *de novo* review." Cited as support in Appellant's *FORM A-11*, pages 2 and 7.

Appendix F

Applicability of FRAP 35(a)(2):

This request is based on a belief that this appeal involves one or more questions of exceptional importance:

(1) How should "undue hardship" under 11 U.S.C. § 523(a)(8)(B) be determined in the Tenth Circuit? (*Appellant's Brief* for the District Court appeal, pages 6-28.)

(2) Does the vagueness of the phrase "undue hardship", contained in 11 U.S.C. § 523(a)(8)(B), render that statute unconstitutionally void for vagueness? (*Appellant's Brief* for the District Court appeal, pages 28-32.)

Based on these arguments that a rehearing in banc is necessary to maintain uniformity of its decisions and because the proceeding involves questions of exceptional importance, the Plaintiff/Appellant respectfully requests a rehearing and suggests a rehearing in banc.

Respectfully submitted,

s/ Michael R. Cuenca, Appellant
1625 Alabama
Lawrence, KS 66044
913-842-8954

APPENDIX G — DENIAL OF PETITION FOR REHEARING

No. 94-2277

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL R. CUENCA,
Plaintiff - Appellant,

v.

DEPARTMENT OF EDUCATION,
Defendant - Appellee.

ORDER
Entered October 26, 1995

Before ANDERSON, BALDOCK, and BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By: s/ Deputy Clerk